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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 480

ROBERT MORALES, ET AL., *Petitioners*

v.

CITY OF GALVESTON, ET AL., *Respondents*

Brief on the Merits for Respondent Cardigan
Shipping Company, Ltd.

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**Brief on the Merits for Respondent Cardigan
Shipping Company, Ltd.**

STATEMENT OF THE CASE

This libel in Admiralty was brought by Robert Morales and seven other longshoreman as a third-party action against the City of Galveston, owner and operator of a grain elevator, and Cardigan Shipping Company, Ltd., owner and operator of the British Steamship GRELMARION. Libellants alleged that while employed by a contract stevedore (not a party to this action) and engaged in trimming bulk grain being loaded from the elevator onto the GRELMARION they were overcome by noxious gases from a fumigant which had been used on the grain. Charges of negligence were made against the

City as owner-operator of the elevator and of negligence and unseaworthiness against Cardigan as owner-operator of the GREL MARION.

Trial before the District Court for the Southern District of Texas, Galveston Division, resulted in a decree for the respondents (181 F.S. 202, 1961 AMC 2199). That decree was affirmed by the Court of Appeals for the Fifth Circuit on February 22, 1960 (275 F. 2d 191). On the initial petition for Writ of Certiorari the Court entered a Per Curiam Order on December 17, 1960 which read "The judgment of the Court of Appeals is vacated and the case is remanded to that Court for consideration in the light of *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539". (364 U.S. 295, 5 L. Ed. 2d 84). Upon that reconsideration the Court of Appeals reaffirmed, in a new opinion, its earlier conclusion that the District Judge had not erred in finding no unseaworthiness (291 F. 2d 97, 1961 AMC 2194). On a second petition to this Court Certiorari has again been granted (368 U.S. 816, 7 L. Ed. 2d 23).

This respondent assumes, and it trusts correctly, that the principal if not the sole concern of this Court on the present hearing is with the issue of "seaworthiness", and particularly with the contexture of that question which may be regarded as following from *Mitchell v. Trawler Racer*, supra. The instant petition for Writ of Certiorari, and the petitioners' brief on the merits, are not so limited and present as well extended arguments against both respondents rested solely in negligence and against the respondent Cardigan for unseaworthiness founded in negligence.

As the brief for the City of Galveston will have dealt at length with the fact question of sole concern to it, and

described the handling of the grain up to the point of delivery into the vessel from the elevator's spout, those details and the related arguments will not be repeated in this brief at any length.

THE ARGUMENT

A. The Facts of the Case

The S/S GREL MARION was a dry-cargo vessel of conventional design and one of a large number of vessels engaged in carrying export grain from the ports of the United States. On this particular voyage she lifted 161,000 bushels of No. 2 yellow corn and 186,000 bushels of No. 1 hard winter wheat for delivery to India, and loaded this cargo at the large ship-side elevator operated by the respondent City. Prior to loading the GREL MARION was "fitted-out" for bulk grain in the usual way, with shifting boards, bins, and feeder boxes, and the ship and these fittings were inspected and approved by a surveyor for the National Cargo Bureau who certified that they conformed to the applicable Coast Guard Regulations. (R. pp. 983, 985, and 990; Cardigan Exhibit 3). All bins were found to be of standard type construction, including the 'tween deck bin in which petitioners were working at the time of the incident in suit (R. p. 985). This bin was formed by a center-line partition or bulkhead and received its grain from a feeder-box in the square of the hatch at one end of the bin. The approximate dimensions of the bin were 28 feet by 22 feet, and the height 9 feet. (cf. R. 249-259 and 374-375).

As described by petitioners they would "beam-out" this grain by pulling it away from the feeder-box and into the further corners of the bins. When they stopped work at

noon the bin was approximately three-fourths full and nothing unusual had happened (R. pp. 41-42). After eating, the petitioners and others re-entered the bin and signalled for a "shot" of grain from the elevator spout in order to resume work. As this first shot of new grain entered their bin the petitioners almost immediately noticed something was wrong, the first symptom being a burning or smarting of their eyes which made tears come (cf. R. pp. 44-46, 279-281). In the words of the gang's "pusher" Sheridan:

"Well, in other words, when that grain come in there, there was something unusual about it. I had never had the experience of that kind of stuff before, and I didn't know what was happening to us." (R. 280).

Several points were undisputed, even by the petitioners' evidence: Until the event last recited this loading had been without incident related in any way. All prior grain received on the ship (and this included almost the entire cargo) was completely free from noxious odors or gases of any kind. No fumigation procedures had been carried out on the ship either to prepare the ship for her cargo or during the loading. Whatever the source of any noxious fumes affecting the petitioners those fumes came directly off this "shot" of grain as it entered the ship's bin from the elevator's spout.

It was equally undisputed that the GREL MARION and her fittings were not only usual and standard but were entirely suitable for the purpose of receiving this cargo of grain and for the engagement of the petitioners in trimming that cargo. The petitioners own testimony made it abundantly clear, as the Trial Court found (Finding of

Fact 9, 10, 11, 17 and 18),¹ that absent those gases which came directly off the grain as it entered the bin this loading operation would have proceeded to a normal and uneventful conclusion.

As both petitions for Writ of Certiorari filed in this case, and even now the petitioners' brief on the merits, make repeated references to the absence of a blower-system for ventilation of the cargo bin (cf. Petitioners' Brief pp. 12, 30) it becomes necessary to point out that no one, including petitioners and their own witnesses, gave any testimony to indicate that "blowers" should have been used to ventilate such cargo bins during loading, or even to suggest that it would have been practical to do so. (R. pp. 63, 107-108, 293-294). Petitioner is in error in stating (Petitioners' Brief p. 12) that the Trial Court did not make any Finding of Fact on the failure of Cardigan to use blowers to force air into the hatch since the Court's Finding of Fact 17 expressly stated "While the GRELMARION cargo spaces were not equipped with forced ventilation system, I find that only very rarely is this the case on grain vessels, and that it is not necessary or customary" (181 F.S. at 206).

To conform this argument to the record it is also necessary to point out that Petitioners' Brief (at p. 30) again

¹ Note as to the Numbering of the Trial Court's Findings of Fact: In the published report of this case before the District Court the Findings of Fact relating to liability are numbered consecutively "1" through "18". However, in some transcription of these Findings of Fact the number "13" was not used and all paragraphs subsequent to "12" were given a number one higher than appropriate. In this brief the Findings of Fact will be referred to as they appear in the printed report. It is noted that in Petitioners' Brief the higher number is used, and the references therein to Finding of Fact "19" are to the Finding of Fact numbered as "18" in the printed report.

has repeated the statements that "Coast Guard books and literature available to the shipping industry show what measures should and could be taken in the event of an occurrence such as occurred here" and for that reason Cardigan was under a duty "to provide either forced ventilation or blowers for the very purpose of preventing asphyxiation and the danger to Petitioners". These statements are completely without foundation in any testimony or exhibits offered at the trial and apparently and solely relate to a manual which libellants' counsel had in possession showing ventilation procedures recommended to be followed *when fumigation had been carried out aboard a ship*. The use of this manual was dropped at the trial since it was apparent that it related only to that special situation which was not true on the GRELMARION. A picture of a "blower-system" taken from the manual was resurrected as "Appendix G" in the first petition for Writ of Certiorari to this Court. While this Respondent contends that these questioned statements are not only misleading but are also not properly a part of the Record in this case, unless these premises are conceded by the Petitioners it is respectfully submitted that this "new evidence" should be placed before the Court in its entirety so that its lack of application to the circumstances here can be correctly evaluated.

A final consideration as to the facts of the case concerns the reference in Petitioners Brief (by emphasis added at p. 7, and at pp. 12, 20, 21 and 30) which would suggest that the petitioners were *asphyxiated* because the flow of grain cut off their supply of oxygen. All of the evidence showed, and the Court found (Finding of Fact 11, 181 F.S. at 205) that this was not the case and that any damage suffered by the petitioners was an intoxication caused by the fumes of chloropicrin coming off the grain.

B. The Law of the Case

In stating the position of this respondent it is assumed and understood that a ship may be rendered unseaworthy by a condition which is only temporary or transitory, and that the ship-owner's notice of this condition, either actual or constructive, is not essential to his liability. However, the questions remain whether, under the facts of this case, it should be found that an unseaworthy condition was present and that this was the cause of injury.

Whether the GREL MARION and her appurtenances were "reasonably suited for their intended use" was a question resolved by the Trial Judge in these terms:

"(17) I find that the GREL MARION'S cargo spaces were of customary design and construction; that they were clean, and in all respects ready to receive the wheat; and had been surveyed and approved prior to loading. No fumigation for weevils was made aboard the vessel, and none was necessary. While the GREL MARION'S cargo spaces were not equipped with forced ventilation systems, I find that only very rarely is this the case on grain vessels, and that it is not necessary or customary, I find that the vessel was not unseaworthy in any respect or particular, and that her Captain, crew, agent or other representatives were not negligent in any particular.

"(18) The finding heretofore has been made that the noxious gases and fumes were introduced into the bin with the last "shot" of grain, and resulted from a fumigant that had been improperly applied, and that had adhered to the grain an unusually long period of time. Under these circumstances, I find that the admission thereof into the bin of the vessel did not cause the GREL MARION to become unseaworthy, the vessel and all its appurtenances being entirely ade-

quate and suitable in every respect". (181 F.S. at 206-207)

Unlike *Mitchell v. Trawler Racer, supra*; *Grzybowski v. Arrow Barge Co.*, 283 F. 2d 481 (4th Cir., October 1960); *Knox v. United States Lines*, 294 F. 2d 354 (3rd Cir., June 1961), and other cases where a jury's verdict has been set aside because the guiding principles were erroneously stated, in the instant case there is no indication that the conclusion of the Trial Judge as to seaworthiness was rested on faulty premises. Petitioners' Proposition is that under the facts here related and as found by the Trial Court the opposite conclusion was required as a matter of law. To a considerable extent the emphasis of that argument is taken from the choice of language used by the Court of Appeals (in the first hearing of this case, 275 F. 2d 191), particularly:

"This is a case of a happening 'when the last batch of wheat came out of the funnels' instantaneously rendering unfit quarters which until then had been, and, when the funnels cleared away, continued to be entirely seaworthy."

These are words which originated with the Court of Appeals and were not words "quoted with approval" from the District Court as stated by Petitioners' Brief, at page 16. While under the circumstances they would not appear to have any significance in the present posture of the case Judge Hutcheson did clarify his meaning in his second opinion (291 F. 2d 97) when he elaborated:

"Here the vessel was *at all times* staunch and fit for the service intended, the reception of grain which did not contain dangerous chemicals, and since it was not intended or expected that grain so contaminated

would be loaded into the bins, the ship was *at all times* seaworthy and fit for its service of receiving uncontaminated grain." (Emphasis added) (291 F. 2d at 98).

In *Mitchell* the slime and fish gurry which made the ship's rail unseaworthy was a normal by-product of the intended service of the vessel. In the *Grzybowski* case the soap was applied to skids as an aid in handling the cargo of steel. In the *Knox* case the collapse of tiers of burlap rolls was a normal concomitant of the carriage of that kind of cargo, as was the collapse of the cargo of potash in *Holley, Admx. v. S.S. Manfred Stansfield*, 186 F.S. 212, 1960 AMC 1956 (E.D. Va. 1960), a case cited in Petitioners' Brief at pp. 16, 20.

A similar if not identical distinction is readily seen in the cashew-nut oil cases, *Valerio v. American President Lines*, 112 F.S. 202 (S.D. N.Y. 1952) and *Anderson v. Lorentzen*, 160 F. 2d 173 (2nd Cir. 1947), cited by Petitioners, since a cashew-nut oil cargo was inherently dangerous to those handling it without appropriate precautions. Of a like characteristic was the carbon tetrachloride used in the *Halecki* case (*United N.Y & N.J. Sandy Hook Pilots Assn. v. Halecki*, 1959, 358 U.S. 613, 3 L. Ed. 2d 541).

In the instant case the Trial Court found, on sufficient evidence, not only that the direct cause of any injury to the Petitioners was a vice in the cargo itself, but also that the presence of this alien gas in the wheat was neither a normal nor to be foreseen characteristic of that cargo. Petitioners' Counsel obviously anticipated the dilemma in which this element of the case would place not only the theory of negligence but also the theory of unseaworthiness since the arguments are here repeated concerning four "similar" incidents of which the parties had

notice. However, as the Trial Court determined (Findings of Fact 12 and 16), the last of these incidents was in 1953, some years previous to the incident in suit, and, unlike the present case of a residue of chloropicrin from negligent fumigation at an inland point (Findings of Fact 12, 13 and 14), those previous cases charged negligent fumigation in the City's own elevator.

In summary, the Petitioners have not brought themselves within the specifications for liability which were announced in the *Mitchell* case, or which may be found in any other case in this area of the maritime law. A contrary conclusion could only be reached if the shipowner's absolute warranty does extend to the freedom of all cargo from conditions which might cause injury. This rule has not been stated in this Court or any other.

Under a separate proposition Petitioners' Brief urges the negligence of both respondents for failing to test the grain between the elevator bins and the ship's hold so as to detect the presence of the injury-causing chloropicrin gas. The errors in that argument, and in the facts given in support, have already been noted in some part. No sufficient reason is offered by Petitioners for disturbing the clear and detailed judgment of the Trial Court on this issue. On this the Court of Appeals said:

"Careful consideration of, and reflection on, the claims and arguments of the opposing parties, in the light of the record and the controlling authorities, leaves us in no doubt that, as to the charges of negligence, there is no basis whatever for the attack here upon the findings as clearly erroneous. Indeed, we are convinced that, under an impartial and disinterested view of the evidence as a whole, the findings are well supported and wholly reasonable.

Overall, and with the facts of this case fairly viewed, the decree for the shipowner fully conformed to the settled principles of the maritime law, including those stated in *Mitchell*. Neither the fact that an accident did occur, nor that it occurred from a transitory, even instantaneous cause, was sufficient without more, to establish unseaworthiness as the cause of injury. The vessel and her appliances remained reasonably fit for the use to which they were put. No more was required.

Blier v. United States Lines Co., 2d Cir. 1961, 286 F. 2d 920, 1961 AMC 1134, cert. den. 368 U.S. 836, 7 L. Ed. 2d 37;

Hooper v. Terminal S.S. Co., 2d Cir. 1961, 296 F. 2d 281;

Morrell v. United States, 9th Cir. 1961, 297 F. 2d 662.

CONCLUSION

For the foregoing reasons, Respondent Cardigan Shipping Company, Ltd., prays that the judgments of the District Court and the Court of Appeals be affirmed.

Respectfully submitted,

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By

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CERTIFICATE OF SERVICE

A copy of the foregoing brief has been mailed this _____
day of April, 1962 to Arthur J. Mandell, Esq., South Coast
Building, Houston 2, Texas, Attorney for Petitioners, and
to Preston Shirley, Esq., Santa Fe Building, Galveston,
Texas, Attorney for Respondent City of Galveston.

SUPREME COURT OF THE UNITED STATES

No. 480.—OCTOBER TERM, 1961.

Robert Morales, et al.,
Petitioners,
v.
City of Galveston et al. } On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit.

[June 11, 1962.]

MR. JUSTICE STEWART delivered the opinion of the Court.

On the afternoon of March 14, 1957, the S. S. *Grelmarion* was berthed at Galveston, Texas, taking on a cargo of wheat from a pierside grain elevator owned and operated by the city. The wheat was being loaded directly from the elevator into the ship by means of a spout. The petitioners were longshoremen engaged in "trimming" the wheat as it was received in the off-shore bin of the vessel's No. 2 hold, which was then about three-quarters full. A last "shot" of grain was called for and was released into the bin. The grain in this last shot had been treated with a chemical insecticide, and the petitioners were injured by fumes from the chemical, made noxious by concentration in the closely confined area where they were working.

The petitioners brought the present suit against the City of Galveston and the owner of the vessel to recover for their injuries.¹ Their claim was predicated upon the negligence of the city and the shipowner, and upon the unseaworthiness of the ship. After an extended trial, the District Court entered judgment for the respondents,

¹ Petitioners of course received compensation and medical treatment under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.* 181 F. Supp., at 207.

based upon detailed findings of fact, 181 F. Supp. 202, and the Court of Appeals affirmed, 275 F. 2d 191. On certiorari (364 U. S. 295) we vacated the judgment and remanded the case to the Court of Appeals for consideration in the light of *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539, which had been decided in the interim. That court, one judge dissenting, was of the view that *Mitchell* was inapplicable to the facts of the present case, and again affirmed the District Court's judgment, 291 F. 2d 97. We granted certiorari to consider a seemingly significant question of admiralty law. 368 U. S. 816.

The factual issues bearing upon the alleged negligence of the city and shipowner were determined in their favor by the District Court. Specifically, the court found that the city had *not* itself applied the fumigant to the grain in question, and that neither of the respondents knew, or in the exercise of reasonable care could have known, that the grain had been improperly fumigated at an inland point by someone else.² Even a cursory examination of

² "14. I find that neither of the respondents knew, or in the exercise of reasonable care should have known, that this quantity of grain, which had been improperly treated with an excessive amount of fumigant, was in the elevator or loaded aboard the *Grelmarion*; and that (for all the evidence shows here) the respondent city, in the operation of its elevator, had never received knowledge of a prior instance where chloropicrin or other fumigants applied at inland elevators had adhered to the grain sufficiently long as to present danger after receipt by the elevator.

"15. I find that the respondent city was not negligent in failing to know or learn of the presence of this quantity of grain within its elevator, in failing to make some additional inspection therefor, or in any other particular. The record shows without dispute that careful and painstaking inspections and examinations were made under governmental authority when the grain was received, and again as it was disbursed by the elevator, which in the present instance failed to detect the presence of the remaining traces of fumigant in this quantity of grain. I find that had additional inspections been made by

the lengthy record shows that these findings were based upon substantial evidence. They were re-examined and affirmed on appeal.³ We cannot say that they were clearly erroneous. *McAllister v. United States*, 348 U. S. 19, 20-21.

Of greater significance in this litigation is the issue which prompted our remand to the Court of Appeals for reconsideration. Briefly stated, the question is whether, upon the facts as found by the District Court, it was error to hold that the *Grelmarion* was seaworthy at the time the petitioners were injured.⁴

In the *Mitchell* case, *supra*, we reversed a judgment for the defendant, because the District Court and the Court of Appeals had mistakenly imported concepts of

the respondent city, there is no reason to believe that such inspections would have been more successful.

"17. I find that the *Grelmarion*'s cargo spaces were of customary design and construction; that they were clean, and in all respects ready to receive the wheat; and had been surveyed and approved prior to loading. No fumigation for weevils was made aboard the vessel, and none was necessary. . . . I find . . . that her Captain, crew, agent, or other representatives were not negligent in any particular." 181 F. Supp. 202, at 206-207.

³ "Careful consideration of, and reflection on, the claims and arguments of the opposing parties, in the light of the record and the controlling authorities, leaves us in no doubt that, as to the charges of negligence, there is no basis whatever for the attack here upon the findings as clearly erroneous. Indeed, we are convinced that, under an impartial and disinterested view of the evidence as a whole, the findings are well supported and wholly reasonable." 275 F. 2d, at 193.

⁴ The District Court and the Court of Appeals, without discussion, proceeded upon the assumption that the petitioners belonged to the class to whom the respondent shipowner owed the duty of providing a seaworthy vessel. This was correct. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85; *Pope & Talbot, Inc., v. Hawn*, 346 U. S. 406.

common-law negligence into an action for unseaworthiness. There the jury had erroneously been instructed that liability for unseaworthiness could attach only if the alleged unseaworthy condition was "there for a reasonably long period of time so that a shipowner ought to have seen that it was removed."⁵ The Court of Appeals had affirmed on the theory that, at least as to an unseaworthy condition that arises during the progress of the voyage, the shipowner's obligation "is merely to see that reasonable care is used under the circumstances . . . incident to the correction of the newly arisen defect."⁶ It was alleged in that case that a ship's rail which was habitually used as a means of egress to the dock was rendered unseaworthy by the presence of slime and gurry. We did not decide the issue, but reversed for a new trial under proper criteria, holding that the shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability, and that he has an absolute duty "to furnish a vessel and appurtenances reasonably fit for their intended use." 362 U. S., at 550.

In the present case the Court of Appeals was of the view that the trial judge's determination of the *Gremarion's* seaworthiness at the time the petitioners were injured was in no way inconsistent with our decision in the *Mitchell* case. We agree. The District Judge did not, as in *Mitchell*, hold that unseaworthiness liability depends upon the shipowner's actual or constructive knowledge. He did not, as in *Mitchell*, indicate that liability may be excused if an unseaworthy condition is merely temporary. Rather, as the Court of Appeals pointed out, the trier of the facts found, upon substantial evidence, that "the cause of the injury was not any defect in the ship but the fact that the last shot of grain which

⁵ 362 U. S., at 540-541, n. 2.

⁶ 265 F. 2d 426, 432.

was being loaded was contaminated" 291 F. 2d, at 98.

The trial court found, upon substantial evidence, that what happened was an unexpected, isolated occurrence. Several years before there had been three, or perhaps four, incidents involving injury to longshoremen from grain *which had been fumigated by the city itself.* But at the time the present case arose the city had adopted a series of safety and inspection measures which made completely innocuous the grain which it fumigated, and "vast quantities of wheat and other grains had been loaded through the elevator, some eight to ten percent of which had been fumigated by the city, without similar incident in recent years."⁷ The court found that the fumes in the present case came from "chloropierin, an insecticide which had never been used by the respondent city."⁸ The petitioners question none of these findings here. Under these circumstances we cannot say that it was error for the court to rule that the absence of a forced ventilation system in the hold did not constitute unseaworthiness.⁹

A vessel's unseaworthiness might arise from any number of individualized circumstances. Her gear might be

⁷ 181 F. Supp., at 205.

⁸ *Ibid.*

⁹ . . . While the Grelmarion's cargo spaces were not equipped with forced ventilation systems, I find that only very rarely is this the case on grain vessels, and that it is not necessary or customary

"The finding heretofore has been made that the noxious gases and fumes were introduced into the bin with the last 'shot' of grain, and resulted from a fumigant that had been improperly applied, and that had adhered to the grain an unusually long period of time. Under these circumstances, I find that the admission thereof into the bin of the vessel did not cause the Grelmarion to become unseaworthy, the vessel and all its appurtenances being entirely adequate and suitable in every respect." 181 F. Supp., at 206-207.

defective, her appurtenances in disrepair, her crew unfit. The method of loading her cargo, or the manner of its stowage, might be improper. *Mahnich v. Southern S. S. Co.*, 321 U. S. 96; *Seas Shipping Co. v. Sieracki*, 328 U. S. 85; *Pope & Talbot, Inc., v. Hawn*, 346 U. S. 406; *Alaska Steamship Co. v. Petterson*, 347 U. S. 396; *Rogers v. United States Lines*, 347 U. S. 984; *Boudoin v. Lykes Bros. S. S. Co.*, 348 U. S. 336; *Crumady v. The J. H. Fisser*, 358 U. S. 423; *Atlantic & Gulf Stevedores, Inc., v. Ellerman Lines, Ltd.*, 369 U. S. 355. For any or all of these reasons, or others, a vessel might not be reasonably fit for her intended service. What caused injury in the present case, however, was not the ship, its appurtenances, or its crew, but the isolated and completely unforeseeable introduction of a noxious agent from without. The trier of the facts ruled, under proper criteria, that the *Gremarion* was not in any manner unfit for the service to which she was to be put, and we cannot say that his determination was wrong.

Affirmed

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

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City of Galveston et al. } On Writ of Certiorari to the
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[June 11, 1962.]

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK concur, dissenting.

The District Court found that the libellants were injured in 1957 as a result of a release into the hold of a "shot" of grain that completely closed the hatch opening, which was the only source of ventilation for the hold in which they were working. This grain had been treated by chemicals for weevil infestation; and the noxious fumes from those chemicals injured libellants.

The vessel's cargo spaces were not equipped with a forced ventilation system. Grain vessels, the District Court found, rarely are so equipped; and it concluded that forced ventilation is "not necessary or customary." If this were an isolated instance of fumigated grain releasing noxious gases, no claim of unseaworthiness could be maintained. But this was not an isolated instance. Of the wheat loaded through this elevator, some 8 to 10% was fumigated by the city. Wheat is commonly fumigated either in the elevators or in railroad cars. When the fumigant is properly applied, the gases and fumes are dissipated so as not to be dangerous or harmful after 24 to 48 hours. The District Court found, however, that to the knowledge of the owners of the vessel several recent incidents like that in the present case had occurred in Galveston, causing injury to longshoremen—one in 1949, one in 1950, two in 1953.

2 MORALES v. CITY OF GALVESTON.

A vessel without a forced ventilation system would be seaworthy if this injury were an unexpected, isolated occurrence. But I agree with Judge Rives of the Court of Appeals that the vessel and her appurtenances were not "reasonably fit for their intended use" (291 F. 2d 97, 99), where up to 10% of the grain loaded from this elevator was fumigated and where the owners had knowledge of like accidents. One "intended service" of this vessel was therefore, the loading of fumigated grain which in the past had given off noxious fumes. Unseaworthiness by reason of the absence of a forced ventilation system is clearer here than it was in *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539, where temporary slime and gurry on the ship's rail rendered it unseaworthy. The unseaworthy condition in the present case had no such temporary span. What happened here shows that the vessel was unseaworthy whenever fumigated grain was being loaded.